Supreme Court, U. S.
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No. 80-658

In the Supreme Court of the United States

October term, 1980

DARRYL R. FREY, *Petitioner*

vs.

CHARLES M. PANZA, JR., *Respondent*

DARRYL R. FREY, and
DARRYL R. FREY, INC., *Petitioners*

vs.

HAMPTON TOWNSHIP, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari

JOHN W. JORDAN IV, ESQUIRE
THOMSON, RHODES & GRIGSBY
1724 Frick Bldg.
Pgh, Pa. 15219
(412) 281-0737

JOHN R. ORIE, JR., ESQUIRE
ORIE & ZIVIC
25th Floor
Lawyers Bldg.
Pgh, Pa. 15219
(412) 281-3180
Attorneys for Respondents

Financial Press Corporation, Pittsburgh

QUESTION PRESENTED FOR REVIEW

Does the Fourth Amendment prevent a municipality from conducting an inspection of an uncompleted and unoccupied structure in order to ascertain whether it is being built in accordance with the building codes without first obtaining a search warrant?

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STATEMENT OF THE CASE

Petitioner is engaged in business as a builder in Western Pennsylvania. He commenced the original action against Charles M. Panza, Jr., the building inspector for Hampton Township, to enjoin the inspection of new houses being built by him in that municipality. All of the houses involved were uncompleted and had never been occupied.

A subsequently filed petition for a temporary restraining order added the assertion that Panza had "entered upon the premises of the personal residence of Darryl R. Frey" to ask questions. At the hearing it was explained that Panza had gone to Frey's home for that purpose but had not entered the house.

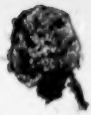
The district court denied plaintiff's request for a preliminary injunction and dismissed the action. Plaintiff then appealed to the United States Court of Appeals for the Third Circuit. Because of the intervening decision of *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the court of appeals vacated the dismissal and remanded the matter to the district court for further consideration. 583 F.2d 113 (3d Cir. 1978).

After remand a second action was commenced against Hampton Township as then recently authorized in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). After further proceedings summary judgments were entered in favor of both defendants. The court of appeals subsequently affirmed in an opinion reported at 621 F.2d 596 (3d Cir. 1980). The petition which is presently before the Court seeks review of that decision.

ARGUMENT

The decision of the court below in the present case is in accord with the decisions of the other courts of appeals in similar cases and with the controlling decisions of this Court.

In *United States v. Biswell*, 406 U.S. 311 (1972), the Court



held that warrantless inspections of the premises of licensed firearms dealers did not offend the Fourth Amendment, explaining:

> "Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.
>
> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316.

In *Marshall v. Barlow's Inc.* 436 U.S. 307 (1978), the Court held that warrantless searches of all businesses subject to OSHA were impermissible, but noted the continuing validity of cases like *Biswell,* stating:

> "Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 US 347, 351-352, 19 L Ed 2d 576, 88 Ct 507 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade [Catering Corp. v. United States, 397 U.S. 72 (1970)]) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* at 313.

Since the *Barlow's* decision a number of courts of appeals have been faced with the question of whether warrantless inspections of mines may be conducted under the Federal Coal Mine Health and Safety Act, *as amended,* 30 U.S.C. §§801 *et*

seq. These courts have uniformly held that such inspections are proper. *Marshall v. Sink,* 614 F.2d 37 (4th Cir. 1980); *Marshall v. Texoline Co.,* 612 F.2d 935 (5th Cir. 1980); *Marshall v. Nolichuckey Sand Co., Inc.,* 606 F.2d 693 (6th Cir. 1979), *cert. denied,* ___ U.S. ___ , 100 S.Ct. 1648 (1980); *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (3d Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980). The Fifth Circuit's explanation in *Texoline* is representative of the rational of these decisions:

> "As exceptions to the warrant requirement, the Court [in Barlow's] cited enterprises where businessmen would have no reasonable expectation of privacy. These included certain pervasively regulated industries, typified by *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms), and those closely regulated businesses having a long history of governmental inspection and supervision, typified by *Colonnade Catering Corporation v. United States,* 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1972) (liquor). Proprietors in these types of businesses consent to these restrictions by choosing to accept the benefits of their trade. 436 U.S. at 313, 98 S.Ct. at 1820. Other than falling within these exceptions, the reasonableness of the warrantless search will depend on the specific enforcement needs and privacy guarantees of the particular statute under review. *Id.* at 321, 98 S.Ct. at 1825." 612 F.2d at 937.

The only question of even colorable substance in the present case was whether the rules stated in the above cases permit warrantless inspections under the BOCA Code of buildings under construction. The courts below were clearly correct in holding that such inspections were proper.

It cannot seriously be denied that there is a long history of governmental regulation of construction in built up areas in this country. *See e.g., Klingler v. Bickel,* 117 Pa. 326, 11 A. 555 (1887); *Buffalo v. Chadeayne,* 7 N.Y.S. 501 (1889), *aff'd,* 134 N.Y. 163, 31 N.E. 443 (1892).

It is also clear that the building industry is pervasively regulated. The BOCA Code and the similar uniform codes published by the International Conference of Building Officials and the Southern Building Code Congress International, Inc., have been adopted by at least 4,455 municipal corporations. This number is generally comprised of smaller municipalities like Hampton Township because most larger cities have developed their own codes.

The BOCA Code consists of 497 pages. Its purpose is indicated in Section 100.4, which states:

> "This code shall be construed to secure its expressed intent, which is to insure public safety, health and welfare insofar as they are affected by building construction, through structural strength, adequate egress facilities, sanitary equipment, light and ventilation and fire safety; and, in general, to secure safety to life and property from all hazards incident to the design, erection, repair, removal, demolition or use and occupancy of buildings, structures or premises."

The safety of the people who will later live in a building can only be insured if it is inspected on as close to a continuous basis as possible while it is under construction. Because of this, since it was first issued in 1950 the BOCA Code has contained inspection provisions like those now challenged by petitioners. If this right of inspection were limited it would not be possible to insure compliance with many requirements. For instance, it is not possible to tell whether concrete is being poured when the surrounding temperature is too low without being on the site at the time. Further, after concrete is poured it is not possible to tell whether it contains required reinforcing rods.

It should also be noted that the new buildings that are involved in this case have never been occupied and therefore cannot contain personal effects of occupants. All that is present is a partially completed product (the building) and the

materials and tools with which it is being finished. It is submitted that one who undertakes to make a complex and highly regulated product can not reasonably object to the inspection of all phases of its execution.

CONCLUSION

For the reasons set forth above, the petition for writ of certiori should be denied.

Respectfully submitted,

JOHN W. JORDAN, IV, ESQUIRE
THOMSON, RHODES & GRIGSBY

JOHN R. ORIE, JR., ESQUIRE
ORIE & ZIVIC
Attorneys for Respondents